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7 IN THE UNITED STATES DISTRICT COURT
8 FOR THE DISTRICT OF OREGON
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10 UNITED STATES OF AMERICA,)
ex rel. HICKEY MARINE)
11 ENTERPRISES, INC., a)
Washington corporation,)
12)
Plaintiff,)
13)
v.)
14)
EAI INTERNATIONAL, INC., a)
15 California corporation; and)
EDWARD V. HILL,)
16)
Defendants.)

17) No. CV 03-1296-HU
FINDINGS AND RECOMMENDATION

18)
EAI INTERNATIONAL, INC. and)
19 MELODIE Z. SCOTT, personal)
representative of the ESTATE)
20 of EDWARD HILL,)
Third-party Plaintiffs,)
21)
v.)
22)
ALASKA-OREGON OFFSHORE MARINE,)
23 INC., an Oregon corporation,)
24 d/b/a OREGON OFFSHORE TOWING,)
Third-Party Defendant.)
25)

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27

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11 HUBEL, Magistrate Judge:

12 Third-party defendant Alaska-Oregon Offshore Marine, Inc.
13 (Offshore) moves for summary judgment on the claims asserted
14 against it by defendants and third-party plaintiffs EAI
15 International, Inc. (EAI) and Melodie Z. Scott, as personal
16 representative for the Estate of Edward V. Hill. Offshore also
17 moves for an award of all costs, including attorney's fees,
18 incurred in defending against those claims.

19 All of the claims asserted by and against EAI in this case are
20 stayed pursuant to 11 U.S.C. § 362, EAI having filed for bankruptcy
21 protection in the United States Bankruptcy Court for the Northern
22 District of California. However, the stay does not apply to actions
23 against sureties. See, e.g., Lockard v. Lockard, 884 F.2d 1171 (9th
24 Cir. 1989); Fintel v. State of Oregon, 10 B.R. 50 (D. Or. 1981).
25 Accordingly, I recommend that the court adjudicate the motion with
26 respect to third-party plaintiff Scott. Although Scott accepted
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1 service on February 18, 2004 (doc. # 30) and filed a third-party
2 complaint on March 22, 2004 (doc. # 35), she has not filed a
3 response to the present motion, and has not complied with orders
4 from this court that she appear. See Orders of August 11, 2004
5 (doc. # 49) and October 13, 2004 (doc. #57).

6 **Factual Background**

7 The court accepts the facts as set out in Offshore's Concise
8 Statement of Material Facts, as they are undisputed by Scott.

9 Plaintiff Hickey Marine Enterprises, Inc. (Hickey Marine) and
10 EAI entered into a bareboat charter agreement on or about September
11 19, 2002, under which EAI chartered from Hickey Marine two dump
12 scows for use in dredging operations in California, being conducted
13 by EAI for the United States through the Army Corps of Engineers.
14 Pursuant to a Standard Towage Agreement (Towage Agreement) executed
15 on September 17, 2002, between EAI and Offshore, Offshore towed the
16 dump scows to and from the dredging operations. Because the
17 dredging project was subject to the Miller Act, 40 U.S.C. § 270,
18 EAI entered into a performance bond, with Hill as the surety. Hill
19 is now deceased, and third-party plaintiff Scott is the personal
20 representative of his estate.

21 In its complaint against EAI, Hickey Marine alleges that the
22 scows were damaged during their use by EAI. In their third-party
23 complaint against Offshore, EAI and Scott allege that any damage to
24 the dump scows was caused by Offshore, and they assert claims for
25 contractual and common law indemnity under the terms of the Towage
26 Agreement. However, Offshore asserts that pursuant to the Towage
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1 Agreement, EAI was required to look to its own insurance as its
2 sole means of recovery for any damage to the dump scows or, in the
3 event that EAI's insurance failed or its insurers refused or were
4 unable to pay for the damages, EAI was deemed its own insurer and
5 required to pay for damage which would otherwise have been paid by
6 its insurers.

7 **Standards**

8 Summary judgment is appropriate "if the pleadings,
9 depositions, answers to interrogatories, and admissions on file,
10 together with the affidavits, if any, show that there is no genuine
11 issue as to any material fact and that the moving party is entitled
12 to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary
13 judgment is not proper if material factual issues exist for trial.
14 Warren v. City of Carlsbad, 58 F.3d 439, 441 (9th Cir. 1995).

15 The moving party has the burden of establishing the absence of
16 a genuine issue of material fact. Celotex Corp. v. Catrett, 477
17 U.S. 317, 323 (1986). If the moving party shows the absence of a
18 genuine issue of material fact, the nonmoving party must go beyond
19 the pleadings and identify facts which show a genuine issue for
20 trial. Id. at 324. Assuming that there has been sufficient time
21 for discovery, summary judgment should be entered against a "party
22 who fails to make a showing sufficient to establish the existence
23 of an element essential to that party's case, and on which that
24 party will bear the burden of proof at trial." Id. at 322.

25 However, if the evidence in support of the motion is
26 insufficient, a motion for summary judgment cannot be granted

1 simply because there was no opposition. Henry v. Gill Industries,
2 Inc., 983 F.2d 943, 950 (9th Cir. 1993); In re Rogstad, 126 F.3d
3 1224, 1227 (9th Cir. 1997).

4 **Discussion**

5 The Towage Agreement between EAI and Offshore provides as
6 follows:

7 A. Intent. It is the intent of the parties that the
8 insurances identified in this section cover all losses,
9 damages, claims, liabilities and suits incident to the
10 services contemplated, and that the parties shall look
11 solely to such insurances, in sequence of first party
12 insurance before third party insurance, rather than
13 maintain claims against each other based upon negligence
14 or fault. To that end, the parties agree to procure and
maintain the following insurances, to promptly submit and
prosecute all claims against such insurances and to look
solely to such insurances for recovery. The lump sum hire
charged by Owner is based in part upon the allocation of
liability and insuring requirements set forth in this
section.

14 B. Required Insurances

* * *

15 (2) Customer. Customer shall procure and
16 maintain the following policies of insurance
with respect to the Tow and/or cargo:

17 (a) hull and machinery insurance
pursuant to Pacific Coast Tug/Barge
18 Form (1979), or equivalent, to the
full actual market value of the Tow;

* * *

19 (4) Failure of Insurance. In the event a party
20 fails to procure and/or maintain an insurance
as required above, an insurance fails for any
21 reason (including, without limitation, breach
of policy condition or warranty) and/or an
insurer otherwise refuses or is unable to pay,
22 the party required to procure that insurance
shall be deemed an insurer or self-insurer,
23 and shall accept and pay claims which would
have otherwise been submitted to the failed
24 insurance and shall indemnify and hold
harmless (including legal fees and costs) the
25 other party of and from any loss, damage,
expense, claim, liability and/or suit
26 resulting from such failure.

27 C. Further Allocation. Subject to the foregoing

1 requirements as to insurance, which shall at all times be
2 deemed primary, and only in the event a loss, damage,
3 expense, claim, liability, and/or suit does not fall
4 within the scope of a required insurance, Owner and
5 Customer shall be separately responsible for, and shall
6 indemnify and hold harmless each other from and against
7 (including legal fees and costs), ... all loss, damage,
8 expenses, claims, liabilities and suits arising out of or
9 relating to property owned by it, with Owner specifically
10 responsible for the Tug and all personal property on the
11 Tug and with Customer (EAI) specifically responsible for
12 the Tow, the cargo, and all personal property on the Tow.

13 Memorandum in Support of Third-Party Defendant's Motion for Summary
14 Judgment, Exhibit C, p. 4, ¶ 8.

15 Offshore asserts that Clause 8.A of the Towage Agreement
16 expressly provides that the sole and exclusive remedy of the
17 parties for damage to the tow (i.e., the dump scows) is through
18 their own insurance, respectively, and further that the parties are
19 to look solely to such insurance, rather than each other, for
20 claims based on negligence or fault.

21 EAI has alleged in the Third Party Complaint that it performed
22 all the obligations and conditions of the Towage Agreement with
23 Offshore, and that pursuant to ¶ 8B(2) of the Towage Agreement, EAI
24 had in place all of the insurance policies in relation to the dump
25 scows required to be provided by EAI. Third Party Complaint, ¶¶ 11,
26 12. However, EAI also alleges that the insurance policies EAI had
27 in place have not provided coverage for any of the damage to the
28 dump scows, to the extent there was any damage, id. at ¶ 12, and
seeks indemnity under ¶ 8D of the Towage Agreement. Paragraph 8D
provides:

Residual Liability and Indemnity. In the event the
insurances identified above do not cover a given loss,
damage, expense, claim, liability and/or suit (other than

1 by virtue of a failure of insurance as addressed in
2 subsection B(4) above), and except for the specific
3 liabilities addressed in subsection C, immediately above,
the parties allocate all other liability and indemnity
based upon their respective degree of legal fault.

4 Offshore argues that EAI has alleged in the Third Party
5 Complaint that despite having procured the insurance as required
6 under the Towage Agreement, "to date the insurance policies ...
7 have not provided coverage," and that this contingency is expressly
8 addressed by ¶ 8B(4) of the Agreement, where EAI specifically
9 agreed that if its insurance "fails for any reason" or "refuses or
10 is unable to pay" then EAI would be deemed a self-insurer. Thus,
11 EAI is contractually obligated to "accept and pay claims which
12 would otherwise have been submitted" to its insurance and to
13 "indemnify and hold harmless the other party [i.e., Offshore] of
14 and from any loss, damage, expense, claim, liability and/or suit
15 resulting from such failure."

16 Offshore argues, further, that ¶ 8C of the Towage Agreement
17 expressly allocates to EAI all liability for damage to the dump
18 scows. This clause states that "subject to the foregoing
19 requirements as to insurance, which shall at all times be deemed
20 primary," in the event of an uninsured or uncovered loss, EAI
21 agreed to be responsible for damage to "the Tow."

22 The Towage Agreement is unambiguous and clearly provides that,
23 under the circumstances alleged in the Third Party Complaint-- a
24 failure of EAI's insurance to cover the loss-- EAI is obligated to
25 pay any claims for damage to the dump scows which would otherwise
26 have been submitted to EAI's insurer. Paragraph 8D of the Towage
27

1 Agreement, upon which EAI relies, is inapplicable. Paragraph 8D
2 expressly states that its provisions apply in circumstances not
3 otherwise covered by paragraphs 8B(4) and 8C.

4 Because Scott's claims for indemnity against Offshore are
5 asserted derivatively, based on her status as surety for EAI, her
6 claim stands on the same footing as that of EAI. Because EAI is
7 contractually barred from asserting its indemnity claims against
8 Offshore, Scott's claims must also necessarily fail.

9 I recommend that Offshore's motion for summary judgment
10 against Scott (doc. # 58) be GRANTED, and that Scott's claims
11 against Offshore be dismissed. I further recommend that Offshore be
12 given leave to submit a motion for attorney's fees and costs.

13 **Scheduling Order**

14 The above Findings and Recommendation will be referred to a
15 United States District Judge for review. Objections, if any, are
16 due February 18, 2005. If no objections are filed, review of the
17 Findings and Recommendation will go under advisement on that date.
18 If objections are filed, a response to the objections is due March
19 4, 2005, and the review of the Findings and Recommendation will go
20 under advisement on that date.

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22 Dated this 3rd day of February, 2004.

23
24 /s/ Dennis J. Hubel

25 Dennis James Hubel
26 United States Magistrate Judge
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